BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act	)	
Competitive Bidding	)	

COMMENTS OF COLE, RAYWID & BRAVERMAN

The law firm of Cole, Raywid & Braverman ("CRB"), hereby submits its Comments in the above captioned proceeding. These comments address the FCC's proposal to use competitive bidding procedures in licensing cellular "unserved area" applications accepted for filing by the FCC before July 26, 1993.[1]

Introduction

In the captioned Notice of Proposed Rulemaking ("NPRM"), the FCC proposes that competitive bidding be used to award cellular unserved area authorizations for applications accepted for filing prior to July 26, 1993. See NPRM, PP Docket No. 93-253 at ¶ 160, released October 12, 1993. Title VI of the Omnibus Budget Reconciliation Act of 1993 (the "Act") authorizes the FCC to use competitive bidding for the award of initial spectrum licenses or construction permits, and mandates such procedures for mutually exclusive applications (with certain exceptions) unless accepted for filing prior to July 26,

[1]CRB represents a number of applicants that filed applications in filing windows between March 10, 1993 and April 14, 1993 in reliance upon FCC rules in effect at the time. Applications in a number of those markets were also accepted for filing by the FCC prior to July 26, 1993. See FCC Public Notice, Mimeo 33832, released July 9, 1993.

1993. However, nothing in the Act, nor its legislative history manifests a congressional intent that these provisions be applied retroactively to applications accepted for filing prior to July 26, 1993. Indeed, amendments were specifically added to the Act to avoid such an unfair result. Moreover, the FCC's proposal would violate long standing judicial policy that newly enacted congressional statutes should apply prospectively, absent circumstances not present here. However, if the Commission decides to use competitive bidding for pre-July 26 cellular unserved area applications, fairness demands that bidding be limited to the present applicants.

I. Use of Competitive Bidding to Pre-July 26, 1993 Unserved Area Cellular Applications Is Contrary to Congressional Intent and Judicial Policy.

In this context, neither the language of the Act nor its legislative history indicates an intent that competitive bidding authority be applied retroactively. Indeed, Congress made specific provisions to prevent unnecessary retroactivity. Section 6002(c) of the Act was amended in conference specifically to allow the use of lotteries for applications that were accepted for filing before July 26, 1993. This allowance changed earlier House and Senate versions of the Act, which would not have allowed any future lotteries, by permitting the Commission to conduct lotteries for "markets for which applications have already been accepted." See House Conf. Rep. No. 213, 102d Congress, 1st Sess. 498 (1993) (Special Rule). Thus, Congress made specific, last minute changes to avoid what the Commission now proposes: applying auctions to applications accepted before July 26, 1993. Without more evidence of specific intent from Congress, application of competitive bidding to

unserved area cellular applications accepted before July 26 would be both unfair and unauthorized.

The Supreme Court has consistently held that newly enacted congressional statutes operate prospectively, not retroactively. See Kaiser Alum. & Chem. Corp. v. Bonjorno, 494 U.S. 827, 841 (1990)(Scalia, J., concurring):

> [S]ince the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only.

Retroactivity is highly disfavored, particularly when not clearly supported by the statute and legislative history. "[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Bennet v. New Jersey, 470 U.S. 632, 641 (1985); Greene v. United States, 376 U.S. 149, 160 (1964) (quoting Union Pac. R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)) ("[R]etrospective operation will not be given to a statute . . . unless such be the 'unequivocal and inflexible import of the terms, and the manifest intention of the legislature'.") Clearly, no such specific indication of Congressional intent exists here.

Assuming the FCC did have discretion to auction pre-July 26 applications, it would be inequitable to do so. The subject applications were filed pursuant to specific FCC rules that required that mutually exclusive situations would be resolved through random selection procedures. See Third Report and Order, 7 FCC Rcd. 7183, 7186 (1992). In reliance on these rules, interested parties made business plans and expended substantial

resources. To suddenly subject these applicants to a license auction process, which could potentially require tens of millions of dollars to participate would, to say the least, adversely affect those applicants who had relied in good faith on existing FCC procedures. Moreover, by abandoning established random selection procedures, licensing of unserved areas will be delayed while the FCC establishes new auction procedures, which themselves are likely to be appealed. On the other hand, lotteries for the subject markets could begin almost immediately under present FCC rules. Without further justification, such retroactive application of competitive bidding procedures is not only unfair, but appears motivated by purely monetary considerations, which Congress specifically prohibited. See 47 USC 309(j)(7)(B).

II. If Competitive Bidding Is Used For Cellular "Unserved Area" Applications, Participation Should Be Limited To Those Applicants Who Filed Prior To July 26, 1993.

If the Commission does decide to auction cellular "unserved area" licenses, fairness and administrative efficiency demand that participation be limited to those who filed prior to July 26, 1993. Pre-July 26 applicants filed in response to formally established filing windows. The FCC put all interested parties on notice that applications not submitted in the appropriate window would not be considered. See 7 FCC RCD 2449, 2456-8; FCC Public Notice 31066, Report No. CL-93-36, released December 23, 1992 (Applications filed after filing window will be dismissed). Consequently, even if auction procedures are adopted, it would be inconsistent with FCC policy and unfair to reopen the pool of applicants.

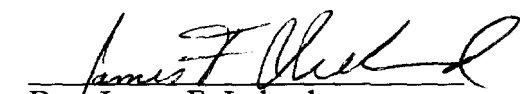
Moreover, limiting the eligible applicant pool as proposed by the FCC would expedite the delivery of service to the public by avoiding another round of application

procedures. It is likely that most parties interested in providing service to these markets have already filed applications. Consequently, reopening the process would introduce delay without any meaningful change in the application pool.

Conclusion

Mutually exclusive unserved area applications accepted for filing before July 26, 1993 should be processed by lottery rather than auctions. Alternatively, if unserved area applications filed before July 26, 1993 are subjected to auction procedures, fairness and administrative efficiency demand that participants be limited to the original pool of applicants for each market.

Respectfully submitted,



By: James F. Ireland

COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Avenue, NW
Suite 200
Washington, D.C. 20006
(202) 659-9750

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